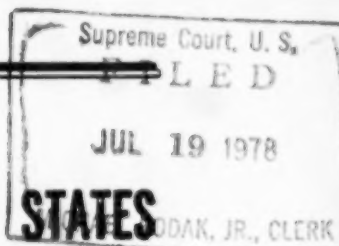


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978



NO. — **78-109** —

EDDIE THOMPSON, JR.,

Petitioner,

v.

KENTON COUNTY BOARD OF ELECTIONS,

A. T. WOOD AND WILLIAM BAUREIS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EDDIE THOMPSON, JR., Pro Se

736 Highland Avenue

Covington, Kentucky 41011

1-606/491-6278

I hereby certify that 3 copies of the foregoing petition have been served by the United States mail, upon: Mr. John Elfers, 107 Park Place, Covington, Kentucky 41011; Solicitor General, Department of Justice, Washington, D.C. 20530, this day of July, 1978.

.....
Eddie Thompson, Jr., Pro Se

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Constitutional Provisions:

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any state deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws. . . . 3, 4, 7

Fifteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. . . . 3, 4, 7

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**IN THE
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NO. _____

EDDIE THOMPSON, JR.,
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**KENTON COUNTY BOARD OF ELECTIONS,
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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, Eddie Thompson, Jr., respectfully prays that a Writ or Writs of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on April 20, 1978; Petition for rehearing denied on May 22, 1978.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Kentucky was entered on June 20, 1977 (Page 2a). There was no hearing as required by due process.

JURISDICTION

The judgment of the District Court dismissing plaintiff's cause of action was entered on June 20, 1977, and a copy thereof is appended (Page 2a) The petitioner docketed an appeal on July 25, 1977. Pursuant to 28 U.S.C.A. 1653 petitioner on August 31, 1977 attempted to amend his pleading. On September 19, 1977, The Court of Appeals denied said motion.

Subsequently, petitioner moved the Court of Appeals for Reconsideration of said motion on September 22, 1977. Thereafter on October 21, 1977, (Page 5a) the Court denied said motion. On April 20, 1978, the Court of Appeals affirmed the District Court's decision. (Page 6a). On May 22, 1978, Petition for Rehearing was denied. (Page 8a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

- (1) Is the dismissal of a complaint, without giving plaintiff an opportunity to be heard, a denial of due process?
- (2) Should the Court entertain an untimely Motion to Dismiss; a motion which the adverse party had not received a copy of?
- (3) Would the complaint, amended to show jurisdiction, state a cause of action?
- (4) Are the rights of qualified voters in a Primary election protected by the 14th and 15th Amendments to the U. S. Constitution, i.e., to have their ballots counted as cast for the candidate/s of their choice; or in the alternate, are the rights of blacks protected in such an election?

- (5) Can an election be fixed by fraud to perpetuate an invidious discriminatory scheme?
- (6) Can the Court of Appeals deny an Amendment to a Complaint to show jurisdiction, without giving a reason?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State Statutes involved are K.R.S. 117.035, 117.045, 117.275, 117.285, 117.295, 117.305, 119.115, 119.135, 119.175, 119.235, 119.245, 120.055, 120.065, 120.075, and 120.085.

The Federal Statutes involved are 28 U.S.C. 1653, 42 U.S.C. 1983, 1988, as is the Fourteenth and Fifteenth Amendments to the United States Constitution. Rule 12 (b) (6) Federal Rules of Civil Procedure.

STATEMENT

There are two cases here to wit — Sixth Circuit #77-1376 and 77-1438. (In the first case, Eddie Thompson, Jr., a black, had sought a Writ of Mandamus to compel the Board of Elections and the Kenton County Clerk to conduct the May 1977 Primary Election according to State law.) Petitioner Eddie Thompson, Jr. had contested the May 1975 Primary. The Kentucky Court of Appeals ruled that there was no statutory authority to contest an election in *Eddie Thompson, Jr. v. Kenton County Board of Elections*, 535 S.W. 2d 68.

In case #77-1438, the Kenton County Board of Election, Mr. A. T. Wood, and Mr. William Bauereis are defendants; In case #77-1376, only the Kenton County Board of Elec-

tion and Mr. Wood are defendants. Since counsel for defendants presented a duplicate brief in Sixth Circuit cases No. 77-1376 and 77-1438, it will be assumed that no arguments were presented on behalf of Mr. Bauereis, nor were the issues presented in 77-1438 addressed.

Respondents have not denied any allegations of either complaint. They merely moved for dismissal, no authority cited. The District Court dismissed; no authority cited, no hearing (in 77-44 — 77-1438), and no timely motion (in 77-34 — 77-1376).

REASONING FOR GRANTING WRIT

The Fourteenth and Fifteenth Amendments were written into the Federal Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and right to full participation in process of government. *Rice v. Elmore*, 165 F.2d 387.

It is clear that where States provide for the election of officers, that right . . . is protected against dilution involving "state action" under the equal protection clause of the Fourteenth Amendment. *Fortson v. Morris*, 17 LEd 2d 330.

No right is more precious than the right of suffrage. It involves "matters close to the core of our Constitutional system." Free and honest elections are the very foundation of our republican form of government. Truly, other rights, even the most basic are illusory if the right to vote is undermined. For compelling consideration . . . The right to vote can neither be denied . . . nor diluted by ballot box stuffing. *Reynolds v. Sims*, 12 LEd 2d 506.

Where measures resorted to by the Board of Election Commissioners involves almost total disregard of all requi-

sites of a particular statute, irregularities cannot be dismissed as minor or technical in character. *Hale v. Goble*, 356 S.W. 2d 1.

All procedure used by a state is an integral part of the election process and must pass muster against charges of discrimination or of abridgement of the right to vote. *Moore v. Ogilvie*, 23 LEd 2d 1.

Rule 12 (b) governing presentations of defenses, provides that the defense of failure to state a claim upon which relief can be granted may be by motion, and, if on a motion asserting that defense, matter outside the pleadings that are presented to and not excluded by the court, the motion shall be treated as one for Summary Judgment and disposed of as in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

The Third Circuit in *Doughterty v. Harper Magazine Co.*, 537 F 2d 758, held that an order dismissing a complaint under Rule 12 (b) (6), entered without affording the plaintiff an opportunity to be heard, must be reversed.

The Fifth Circuit, in *Counsel of Federated Organizations v. Mize*, 339 F 2d 898, characterized as a denial of due process: the entry of an order dismissing the complaint for failure to state a claim without giving the plaintiff an opportunity to be heard.

Due process implies notice of a hearing. *Orchard v. Alexander*, 157 U.S. 372.

The fundamental requirements of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard rights for which the constitutional protection is invoked. *Anderson National Bank v. Lockett*, 321 U.S. 233.

The motion to dismiss performs the same function as the old general demurrer in that it admits the well pleaded material allegations of the complaint. *Cruz v. Betts*, 31 LEd 2d 263. *Mitchell v. Wright*, 154 F 2d 924.

The motion should not have been granted unless it appeared beyond a doubt that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Haines v. Kernes*, 30 LEd 2d 652; *Carter v. Stanton*, 31 LEd 2d 569.

Court of Equity may enter a mandatory injunction affirmatively compelling the doing of some act. *State of Alabama v. United States*, 304 F 2d 583, 590.

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits. *Forman v. Davis*, 9 LEd 2d 222; *Conley v. Gibson*, 2 LEd 2d 80.

Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts. 28 U.S.C. 1653; *Rose v. Elliott*, 70 F.R.D. 422; *Clark v. Travelers Life Insurance*, 518 F 2d 1167.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . F.R.C.P. Rule 15 (a).

Failure of complaint to contain a statement of grounds upon which court's jurisdiction actually depended, was not fatal to sustaining jurisdiction on basis of federal question since under statute the missing allegation could be supplied at any time including on appeal and Court of Appeal would consider complaint to be amended to allege

jurisdiction under 28 U.S.C. 1653. *Eisler v. Stritzler*, 535 F 2d 148.

Discretion of trial court with respect to amending pleading must not be abused and refusal to permit an amendment must have a justifying reason. *Anderson v. American Oil Co.*, 60 F.R.D. 676.

The grant or denial of an opportunity to amend pleading pursuant to Federal Rules of Civil Procedure Rule 15 (a) is within the discretion of the Federal District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules. *Forman v. Davis*, 9 LEd 2d 222.

Civil Rights suit was appropriate for application of statute which expressly allows amendments of defect to jurisdictional allegations. *Rotalo v. Borough of Chorleroi*, 532 F 2d 920.

The approval by the court below of the Trial Court's decision makes a travesty of the 14th and 15th Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, this court should grant the Petition for Certiorari and hear the issues raised in this important area of civil rights.

Respectfully submitted,

.....
EDDIE THOMPSON, JR., Pro Se

APPENDIX

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON**

CIVIL ACTION NO. 77-44

EDDIE THOMPSON, JR.,

Plaintiff,

v.

**KENTON COUNTY
BOARD OF ELECTIONS, ET AL.,**

Defendants.

ORDER

(Filed June 15, 1977)

The defendants having moved the Court to dismiss, it is hereby,

ORDERED AS FOLLOWS:

1. The plaintiff be and is granted a period of twenty (20) days from the date of this Order within which to respond.

2. At the expiration of twenty (20) days, the Clerk of this Court shall forward the file herein to the undersigned Judge.

This 15 day of June, 1977.

/s/ **EUGENE E. SILER, JR.,**
Judge

la

2a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 77-44

EDDIE THOMPSON, JR.,
Plaintiff,

v.

KENTON COUNTY
BOARD OF ELECTIONS, ET AL.,
Defendants.

ORDER

(Filed June 20, 1977)

Upon motion made by the defendants, it is hereby

ORDERED that this matter be and is dismissed for failure to state a cause of action upon which relief may be granted. Plaintiff has alleged a number of state law violations, but he has failed to allege any federal constitutional violations which are required in bringing this case pursuant to 28 U.S.C. § 1343 (3), incorporating 42 U.S.C. §§ 1983, 1988.

This 20 day of June, 1977.

/s/ EUGENE E. SILER, JR.,
Judge

3a

No. 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

ORDER

(Filed August 10, 1977)

Upon consideration of the plaintiff-appellant's motion to advance the cause herein for hearing, and it not appearing that any representation has been made to demonstrate why this case should have precedence,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

4a

No. 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

ORDER

(Filed September 19, 1977)

This matter is before the Court upon the motion of appellant to amend his complaint that he filed in the District Court.

It appears that the new facts alleged were never presented to the District Court for its consideration and cannot properly be made a part of the record on appeal as permitted by Rule 10(a), Federal Rules of Appellate Procedure.

Accordingly, it is ORDERED that appellant's motion be, and it is hereby denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

5a

No. 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

ORDER

(Filed October 21, 1977)

Before: WEICK, CELEBREZZE and ENGLE, Circuit Judges

This matter is before the court upon the motion of appellant requesting a reconsideration of the court's order of September 19, 1977 denying his motion to amend the complaint which had been filed in the district court.

Upon consideration of the matter it is ORDERED that the motion be, and it hereby is, denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

Nos. 77-1376 and 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF ELECTIONS
and A. T. WOOD, County Clerk,
Defendants-Appellees (77-1376),

and

KENTON COUNTY BOARD OF ELECTIONS
and A. T. WOOD and WILLIAM BAUREIS,
Defendants-Appellees (77-1438).

ORDER

(Filed April 20, 1978)

Before: PHILLIPS, Chief Judge; ENGEL and KEITH,
Circuit Judges

These two appeals, which have been consolidated for hearing in this court, challenge certain actions of the Kenton County, Kentucky, Board of Elections and the Kenton County Clerk in conducting a primary election in May, 1977. Plaintiff Eddie Thompson, Jr. alleged that he was a candidate for City Commissioner of the City of Covington in that election. His two complaints, one of which sought mandamus relief in advance of the election

and the other which sought injunctive and other relief following the conduct of the election, made numerous charges that the defendants did not comply with applicable Kentucky election laws and in a general way charged that the defendants had "rigged" the May 1977 primary election.

Plaintiff now appeals from the district court's dismissal of both complaints for failure to state a claim upon which relief could be granted, Rule 12(b)(6), F. R. Civ. P.

While the plaintiff has eloquently argued his cause and while the court has endeavored to liberally construe the pleadings filed, *see Haines v. Kerner*, 404 U.S. 519 (1972), the court is unable to find among the well-pleaded facts of the complaints any issues of federal constitutional significance. Instead, construed in the light most favorable to the plaintiff, the allegations pled at best a cause of action cognizable only under state law and hence outside the federal question jurisdiction of the district court. Accordingly, it appearing that the district court did not err in dismissing the complaints,

IT IS ORDERED that the judgment of the district court in each of the above cases be and it is hereby affirmed.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

77-1376 and 1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

v.

KENTON COUNTY BOARD OF ELECTIONS
and A. T. WOOD, County Clerk,
Defendants-Appellees (77-1376),
and
KENTON COUNTY BOARD OF ELECTIONS
and A. T. WOOD and WILLIAM BAUREIS,
Defendants-Appellees (77-1438).

ORDER

(Filed May 22, 1978)

Before: PHILLIPS, Chief Judge; ENGEL and KEITH,
Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the plaintiff-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk